84-838

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NO. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

NOEL GEORGE
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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QUESTION PRESENTED

WHETHER THE CONNECTICUT SUPREME COURT ERRED IN AFFIRMING THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO FULLY CROSS-EXAMINE AN UNSENTENCED ACCOMPLICE WHO WAS THE SOLE EYEWITNESS AND PARTICIPANT IN THE CRIMINAL CONSPIRACIES AS TO WHETHER HE HOPED TO RECEIVE A CONCURRENT SENTENCE IN THE PRESENT CASE, I.E., CONCURRENT WITH A 3 1/2 YEAR TO 7 YEAR SENTENCE HE WAS ALREADY SERVING, ALL IN VIOLATION OF THE PETITIONER'S FOURTEENTH AND SIXTH AMENDMENTS RIGHT TO CONFRONTATION.

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CONNECTICUT GENERAL STATUTES

§53a-48. Conspiracy. Renunciation as affirmative defense

§53a-103 Burglary in the third degree: Class D felony

§53a-122 Larceny in the first degree: Class D felony

FEDERAL STATUTE:

28 U.S.C. 1257 (3)

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NOEL GEORGE
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE
STATE OF CONNECTICUT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court for the State of Connecticut entered in this proceeding on August 28, 1984, rehearing denied September 26, 1984.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 194 Conn. 361 (August 28, 1984), and appears in the Petitioner's Appendix along with the Connecticut Supreme Court's Order dated September 26, 1984, denying rehearing.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on August 28, 1984 and a timely Motion for Rehearing was filed. An order denying a rehearing was issued on September 26, 1984. The Petition for Certiorari was filed within sixty (60) days of

the judgment of September 26, 1984. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES

§53a-48. Conspiracy. Renunciation as affirmative defense

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances mafifest-

ing a complete and voluntary renunciation of his criminal purpose.

§53a-103. Burglary in the third degree: Class D felony

(a) A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein.

(b) Burglary in the third degree is a class D felony.

§53a-122. Larceny in the first degree: Class D felony

(a) A person is guilty of larceny in the first degree when:

(1) The property or service, regardless of its nature and value, is obtained by extortion, or

(2) the value of the property or service exceed two thousand dollars.

(b) Larceny in the first degree is a Class B felony.

FEDERAL STATUTE:

28 U.S.C. 1257 (3):

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE*

The Petitioner, Noel George, was charged in an information on July 6, 1979, for the crimes of Conspiracy to Commit Larceny in the First Degree

*The references to the record, transcript and exhibits refer to the printed record, transcripts and exhibits that are on file in the Connecticut Supreme Court under Docket Number 10488, State of Connecticut v. Noel George.

in violation of §53a-122 of the Connecticut General Statutes, and Conspiracy to Commit Burglary in the Third Degree, in violation of §53a-103 of the Connecticut General Statutes. The Petitioner was tried by a jury commencing on August 26, 1980 until October 1, 1980, when guilty verdicts were entered on both counts. His post convicton motions for acquittal and a new trial were denied on November 7, 1980. He was sentenced to the custody of the Commissioner of Correction, at Somers, to a term of not less than 5 years nor more than 10 years on the Conspiracy to Commit Larceny charge, and to a term of not less than 2 1/2 years nor more than 5 years on the Conspiracy to Commit Burglary charge, with said sentences to be served

concurrently with each other for an effective sentence of not less than five years nor more than 10 years and costs of $10.00. [Record, Connecticut Supreme Court, pp. 6-8]. A timely appeal was filed to the Connecticut Supreme Court on November 7, 1980, which Court affirmed his conviction on August 28, 1984 and denied a rehearing on September 26, 1984. [See Appendix 1 and 2.]

On July 6, 1979, the defendant, Noel George, was arrested on a warrant charging that he conspired with one Edward Benner to burglarize the home of the O'Learys in Woodbury, Connecticut for the purpose of stealing Hummels, which the defendant would thereafter sell to Eileen Snyder, a dealer of Hummels who lived

in Wolcott, Connecticut [Defendant's Exhibit One; Defendant's Exhibit Two]. On June 1, 1979, Edward Benner was arrested for a burglary of Hummels in Prospect, Connecticut [T. 969].The first time Noel George's name was mentioned in connection with the burglary in Woodbury was when Benner inquired of Trooper Rutkowski on June 4, 1979, as to how badly he, Benner, was wanted [T. 925-929]. Thereafter, Benner wrote out a statement on June 5, 1979, naming Noel George as the mastermind of a Woodbury burglary for which Benner had not been charged [Defendant's Exhibit Two]. However, Benner did not sign the statement until June 13, 1979, when, as a result of a plea bargain in the Prospect burglary, the charge of Burglary in

the Third Degree, a Class D felony calling for a maximum sentence of 2 1/2 to 5 years incarceration, was reduced to Criminal Trespass Second Degree, a Class B misdemeanor calling for a maximum sentence of six months, and on the Criminal Trespass, Benner received a 180 day sentence suspended after only 30 days and two years probation [T. 969-979; 411-412].

During the trial, Edward Benner testified, admitting to being an accomplice and the sole eyewitness to and participant in the alleged conspiracy with the defendant [T. 290-370]. Benner further testified that while the charges in this case were pending, he failed to appear and was subsequently arrested and sentenced for new charges out of

Hartford Superior Court, receiving 3 1/2 to 7 years [T. 409-410; 294-295; Defendant's Exhibit Seven and Eight]. At the time of his testifying in September, 1980, Benner's tentative parole date was sometime in 1982 [T. 494-495].

The witness, Edward Benner, further testified that on the pending charges he could get a maximum of thirty to sixty years, and there was no recommendation to be made by the State at the time of sentencing on those pending charges except to remark to the sentencing Court at the time of sentencing that the witness, Benner, had cooperated with the State in the prosecution of the defendant. On further cross-examination by the defendant, the witness, Benner, in

response to a question as to whether he had hopes of leniency or getting a light sentence in reference to the pending charges because of his cooperation, he answered that he "prayed a lot" [T. 489]. The defendant's attorney then asked Benner if he was hoping to get a concurrent sentence in the present case for which he was awaiting sentence [T. 495]. The State objected and the Court sustained the objection, to which the defendant duly took exception [T. 495-496].

Mrs. Snyder testified that she paid $800.00 to $1,000.00 for $2,000.00 to $3,000.00 worth of Hummels; that she was not a fence, but was a collector and not a seller, and

that out of all the Hummels she received on April 26, 1979, the only ones she hadn't sold as of June 12, 1979, were five broken Hummel figurines, four Hummel plates, four fake Hummel figurines and one Goebel figurine [T. 584-594; 611; 589; 637; State's Exhibit 7A-0]. Mrs. O'Leary had previously testified that 31 Hummel plates were stolen from her home [T. 73-77].

Mrs. Snyder further identified the defendant, Noel George, as being the man who brought her the Hummels in State's Exhibit 7A-0 [T. 632-634; 657]. Her description of the man named "Jack" who brought her the Hummels was that he was thin, with a thin face, brown hair and a full beard, 5 foot 9 inches, about 175

pounds, dressed very neatly [T. 590]. She was certain that the defendant was the same man who two years before April of 1979, came to her with other Hummels, and that at that time the defendant was clean shaven [T. 639-640; Defendant's Exhibit One]. In a demonstration with one Michael Panasci, who was 6 feet tall and weighed 175 pounds, with a thin face and thin build, the jury was able to see that the defendant was about three inches taller than Panasci and 50 pounds heavier, with a large face and build [T. 633-634; 1562].

The defendant testified that there was no conspiracy and that he did not know Mrs. Snyder [T. 1308; 1326-1329]. Furthermore, eight other witnesses including the defendant's

barber testfied that the defendant was never clean shaven, and always had a full beard between 1974 and the date of the trial [T. 730-731; 766-767; 825-828; 838-844; State's Exhibit Eight; Defendant's Exhibit Thirteen; T. 895; 1507-1508; 1553-1554; 1572; 1622-1623]. Furthermore, the defendant, Noel George, testified that, in effect, Benner was framing him because of their former relationship, Mr. George having been a guard when Mr. Benner was an inmate [T. 1218-1333].

The Connecticut Supreme Court directly addressed the Trial Court's refusal to allow defense counsel to cross-examine the sole eyewitness and participant in the two criminal conspiracies. It held that "although

the trial court should have permitted the inquiry concerning Benner's hope for a concurrent sentence on the pending charges, the contrary ruling did not, under all the circumstances, have the effect of violating the defendant's right of confrontation". State v. George, 194 Conn. 361, 365 (1984). In effect, without using the "key labels", the Connecticut Supreme Court applied a harmless error test to a violation of the Petitioner's right to confrontation by failing to find a violation of that right under relevant circumstances in violation of Brookhart v. Janis, 384 U.S. 1, 3 (1966).

REASONS FOR GRANTING THE WRIT

The decision rendered by the Connecticut Supreme Court concerning the denial of the Petitioner's right to confrontation is probably not in accord with the applicable decisions of This Court in Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129 (1968); Pointer v. Texas, 380 U.S. 400 (1969), Brookhart v. Janis, 384 U.S. 1 (1966). The Connecticut Supreme Court committed constitutional error in affirming the trial court's refusal to allow defense counsel to cross-examine an unsentenced and uncorroborated accomplice, particularly when he was the sole eyewitness and participant in the conspiracies in question. There

was a denial of the defendant's right to conduct a complete cross-examination when defense counsel was not allowed to ask whether the uncorroborated accomplice hoped to receive a concurrent sentence in the present case, i.e., concurrent with the 3 1/2 to 7 year sentence he was already serving on another matter. This abridgement of the Petitioner's cross-examination was in violation of his Fourteenth and Sixth Amendments right to confrontation, and necessitates a review by This Court.

ARGUMENT

The Connecticut Supreme Court Erred in Affirming the Trial Court's Refusal to Allow Defense Counsel to Fully

Cross-Examine an Unsentenced Accomplice Who Was the Sole Eyewitness and Participant in the Criminal Conspiracies as to Whether He Hoped to Receive a Concurrent Sentence in the Present Case, i.e., Concurrent With a 3 1/2 Year to 7 Year Sentence He Was Already Serving, All in Violation of the Petitioner's Fourteenth and Sixth Amendments Right to Confrontation.

The Petitioner is seeking certiorari as a result of his being denied basic federal constitutional rights. Mr. George was denied the opportunity to fully cross-examine the key witness against him - a Mr. Benner. Mr. Benner was an inmate in institutions when Mr. George had been a guard, and was the sole eyewitness and participant in the two conspiracies charged, to wit, the

burglary and larceny at Woodbury, Connecticut resulting in the theft of a Hummel collection. It was Mr. Benner's testimony that placed Mr. George in both conspiracies. The need for a complete cross-examination is highlighted by the presence of a discrepancy in the identification and description of the Petitioner in this matter by a Mrs. Snyder, who ultimately purchased the Hummels and identified the Petitioner.

The trial court refused to allow the defense attorney to question Mr. Benner concerning his hope to receive a concurrent sentence on the present

charges, and did so on an improper basis.[1] The prosecutor objected to this inquiry and indicated that the defense attorney could not go beyond the written record of Benner's convictions already in evidence. George, supra, at 361. It should be noted that the Connecticut Supreme Court stated that no good reason for

[1] When the Assistant State's Attorney made the objection, he knew that the defendant had not previously introduced any records in reference to the charges for which Mr. Benner was presently awaiting sentencing [T. 495]. It is clear that the trial court relied on the other convictions that were in evidence. State v. George, supra, at 361.

disallowing the inquiry concerning Benner's hope for a concurrent sentence was advanced by the prosecution. Id. at 366. In fact, the Connecticut Supreme Court expressly found that the trial court should have permitted the inquiry concerning Benner's hope for a concurrent sentence on the pending charges. Id. at 365. The Connecticut Supreme Court then went on to hold that under all the circumstances, the ruling did not have the effect of violating the Petitioner's right of confrontation. Ibid.

Mr. Benner, a self-confessed accomplice, plead guilty prior to trial to four charges arising out of

the Woodbury burglary - Conspiracy to Commit Burglary in the Third Degree, Burglary in the Third Degree, Conspiracy to Commit Larceny in the First Degree and Larceny in the First Degree. He testified that he could receive up to 60 years, but the state had not agreed to make a sentencing recommendation. George, supra, 360-61. In the course of cross-examination, Mr. Benner, when asked if his testimony would help him at the time of his sentencing for his involvement in the Woodbury cases responded, "I pray a lot". Id. at 361.

The Petitioner has basic federal constitutional rights in the instant case under the Fourteenth and Sixth Amendments to the United States

Constitution. It is well established that an accused, in a state criminal prosecution, has a right to confront opposing witnesses and to conduct a complete cross-examination. Pointer v. Texas, 380 U.S. 400 (1969); Smith v. Illinois, 390 U.S. 129 (1968); Davis v. Alaska, 415 U.S. 308 (1974). The right of confrontation is best illustrated in terms of the instant matter by Davis v. Alaska, supra, and Smith v. Illinois, supra. In Davis, This Court held that confrontation means more than being able to confront a witness physically. Id. at 315. Davis expressly recognized that "a more particular attack on a witness's credibility is effected by means of a cross-examination directed toward revealing possible biases, prejudices

or ulterior motives of witnesses as they relate directly to issues or the personalities in the case at hand". Davis, supra, at 316.

The Davis decision involved a juvenile witness who was on probation at the time of trial. The possibility of a violation of that probation was a basis for bias, motive and/or prejudicedice indicating a desire to identify the accused. This Court wrote:

> . . . [P]etitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either ther not to be believed in his identification of petitioner or at least very carefully considered in that

light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record - if the prosecution insisted on using him to make its case - is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness.

Davis, supra at 39.

In Smith v. Illinois, supra, This Court reversed a state criminal conviction, wherein an informer testified, but his true name and address were withheld from the defense and they were not allowed to cross-examine on those areas. This inability to completely cross-examine the witness was found to violate the accused's right to confrontation where credibility of the witness was an issue. Furthermore, a denial of the right to cross-examine constitutes constitutional error and no amount of showing of want of prejudice would cure it. Id. at 131, citing Brookhart v. Janis, 384 U.S. 1 at 3 (1966).

In Mr. George's trial, credibility was an essential issue regarding whom to believe, Mr. George

or Mr. Benner. Furthermore, motive and bias were a key to the cross-examination, and the Petitioner had a right to inform the jury that Mr. Benner could have any new sentence emanating from the Woodbury crimes running concurrently with the time he was serving for unrelated crimes. In other words, he had a substantial motive to lie. The Connecticut Supreme Court recognized this right, but, in effect, applied a "harmless error" test without using that label. This is inappropriate in light of Smith, supra, and Brookhart, supra, and is constitutionally erroneous.

The application of a "harmless error" test is also inappropriate as indicated by the two leading harmless error decisions of This Court. In

Fahy v. Connecticut, 375 U.S. 85 (1963), This Court held that "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction". Id. at 86-87. In Chapman v. California, 386 U.S. 76 (1967), This Court required "the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained . . . and before a federal constitutional error can be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt". Id. at 23-24. If the Petitioner had been permitted to probe the possibility of concurrent sentences in return for or

as a reward for Benner's testimony, serious damage to the strength of the State's case would have been a real possibility. The result was that the Petitioner was not permitted his constitutionally mandated right to expose a witness's motivation in testifying as part of his constitutionally protected right of cross-examination. Davis, supra, at 316. The Davis decision also noted that the Court would not speculate on the jury's having accepted the defendant's line of reasoning, but rather that the jury should have had the benefit of the defense theory before it in order to make an informed judgment as to the weight to give the witness's testimony, which provided a critical link in the State's case.

The District of Columbia's Court of Appeals' decision in Coligan v. United States, 434 A.2d 483 (D.C. App. 1981), is illustrative of the deprivation of the Petitioner's constitutional rights. In Coligan, the victim was the key government witness in a prosecution for armed kidnaping and armed robbery. He had an unrelated drug charge pending against him, and the defense attorneys were not allowed to cross-examine him on this unrelated drug charge. This denial was held to be a violation of the defendant's Sixth Amendment right to confrontation on the basis that when a witness has a private, personal liberty interest within the court system, such as a pending charge or probationary status, the witness may

have a motive to curry favor by testifying for the government. Id. at 485. The Court went on to note that the opportunity to engage in "bias" cross-examination becomes of critical importance when, as in the instant case, the witness is a key government witness whose largely uncorroborated testimony establishes one or more of the elements of the charge. Id. at 485.

In the instant case, Benner, who was not allowed to be completely cross-examined, was not a victim, but rather an admitted co-participant who had the opportunity to gain a concurrent sentence with the 3 1/2 to 7 year sentence he was already serving. This is clearly a more egregious situation than that

considered by the court of appeals in Coligan. Furthermore, Mr. Benner clearly had a personal liberty interest and gave largely uncorroborated testimony that established one or more of the elements of the conspiracies. The cross-examination on the hope for a concurrent sentence certainly would have dispelled the mistaken inference that because Mr. Benner was already in jail, he had no reason to change his story or tell untruths. In fact, he had every reason to ingratiate himself with the prosecution in order to have any time served on the Woodbury charges run concurrently with the 3 1/2 to 7 year sentence he was already serving. The Petitioner was denied the opportunity to place Mr. Benner in

his proper setting and to put the weight of his testimony and his credibility to a test, without which the jury could not fairly appraise him. The jurors were left with an inaccurate picture in their minds as to the proper setting that Mr. Benner found himself in, i.e., being in jail on other charges and thus not being able to profit by lying about the Petitioner because he was already in jail.[2]

Finally, the Petitioner was prejudiced when his attorney was unable, in the final argument, to

2 See, Smith v. Illinois, 390 U.S. 129 132, (1968), citing Alford v. United States, 282 U.S. 687, 688-89 (1931), involving a federal prisoner and holding that a "jury was entitled to know who the witness is, where he lives and what his business is".

argue that the witness had good reason to lie and turn in the defendant in order to get consecutive sentences on the charges on which he was awaiting sentencing.

In summary, the Petitioner took the stand and denied his involvement, but was not allowed to fully cross-examine the State's key witness against a matter going to the motivation for his testimony. He was forced by the trial court to fight with one hand tied behind his back. Therefore, This Court should grant his Petition for Certiorari and review whether or not the Connecticut Supreme Court has unfairly denied him a complete trial and decided this issue in accord with Davis v. Alaska, supra; Smith v. Illinois, supra; Fahy v.

Connecticut, supra; Chapman v. California, supra and Brookhart v. Janis, supra.

CONCLUSION

For the reasons hereinbefore set forth, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

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Counsel for the Petitioner

CERTIFICATION OF SERVICE

I hereby certify that I have placed in the United States Mail, postage prepaid, three (3) copies of the Petition for a Writ of Certiorari to the Suprme Court for the State of Connecticut, and the Appendix thereto, to counsel for the Respondent State of Connecticut:

John Connelly
State's Attorney, and
Ann Bradford Ward
Assistant State's Attorney
Judicial District of Waterbury
300 Grand Street
Waterbury, CT 06720

on November 21, 1984.

Joseph F. Keefe

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APPENDIX

APPENDIX INDEX

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APPENDIX (1)

Opinion of the
Connecticut State Supreme Court

194 Conn. 361 (August 28, 1984)

STATE OF CONNECTICUT *v.* NOEL J. GEORGE (10488)

PETERS, PARSKEY, SHEA, GRILLO and DALY, Js.

Convicted of the crimes of conspiracy to commit larceny in the first degree and of conspiracy to commit burglary in the third degree, the defendant appealed to this court. He claimed that the trial court erred in certain evidentiary rulings involving both B, who was the state's principal witness as well as a self-confessed accomplice in the crimes charged, and S, who was called as a witness by the defendant and who worked as a corrections officer at the correctional facility where the defendant was employed in a similar capacity. He also challenged the trial court's refusal to grant his request to charge on the credibility of E, a witness who had identified him as the person who had sold her certain goods which were later identified as stolen. *Held:*

1. The trial court did not deprive the defendant of a fair opportunity to bring to the attention of the jury any significant consideration bearing on the credibility of B when that court sustained the state's objection to a question in which the defense asked whether he hoped to receive a sentence for the subject crimes which would be concurrent with sentences he was already serving for certain unrelated crimes.
2. The trial court did not abuse its discretion in disallowing, for lack of a sufficient foundation, a question by which the defendant sought to elicit S's opinion of the truth and veracity of B, whom S had known while B was an inmate at the correctional facility where S and the defendant were employed.
3. The defendant's claim to the contrary notwithstanding, certain testimony given by S in response to a hypothetical question posed by the state was admissible not only in that it related to the credibility of certain testimony given by the defendant but also in that it tended to show that the defendant's association with B at a time coinciding closely with the incident in question was not so innocent as the defendant claimed.
4. The defendant failed properly to preserve for appellate review his claim that the trial court erred in excluding, on the ground of hearsay, his proffered testimony as to certain statements made to him by B in the course of conversations they had about their relationship as prisoner and guard; more, with respect to his claim that the exclusion of that proffered testimony violated his state constitutional "right to be heard by himself . . . ," that right does not permit a defendant to testify in disregard of the rules of evidence.
5. The trial court did not err in excluding testimony of a criminal attorney, introduced by the defendant as an expert witness, about what might have induced the state to enter into a plea bargain with B in connection with charges arising out of an unrelated crime; the inferences which

the defendant sought to elicit were so obvious that they could have been drawn by the jury and articulated by the defendant's counsel during his summation.

6. The trial court did not, under the circumstances here, err in refusing to give the requested charge on the credibility of E.

Argued June 12—decision released August 28, 1984

Information charging the defendant with the crimes of conspiracy to commit larceny in the first degree and of conspiracy to commit burglary in the third degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Henebry, J.;* verdict and judgment of guilty, and appeal by the defendant to this court. *No error.*

Louis S. Avitabile, with whom, on the brief, was *John P. Santucci,* for the appellant (defendant).

Catherine J. Capuano, special assistant state's attorney, with whom, on the brief, were *Francis M. McDonald,* state's attorney, and *Bradford J. Ward,* assistant state's attorney, for the appellee (state).

SHEA, J. After a jury trial the defendant was convicted of conspiracy to commit larceny in the first degree in violation of General Statutes § 53a-122 and of conspiracy to commit burglary in the third degree in violation of General Statutes § 53a-48 and General Statutes § 53a-103. In his appeal from the judgment the defendant claims error in five rulings of the trial court on evidence and also in the failure to grant his request to charge upon the credibility of a witness for the state. We find no reversible error.

From the evidence the jury could reasonably have found that on April 19, 1979, a forcible entry had been made into a house in Woodbury and that various items, including a collection of Hummel figurines, had been stolen from the premises. About three weeks before the burglary, the defendant had visited the house and had seen part of the Hummel collection.

On June 13, 1979, Edward Benner gave a written statement to the police in which he confessed to the burglary of the Woodbury residence and the theft of the Hummel collection as well as some other property he found within. His statement also implicated the defendant in these crimes.

At trial Benner testified that the defendant told him of the Woodbury residence and wanted him to steal the Hummel collection. He said that after the theft he delivered the collection to the defendant, who paid him between $300 and $500 for his services.

Eileen Snyder, who had an extensive Hummel collection, testified that several years earlier she had purchased some Hummel figurines from the defendant who then used the name, Jack Stolfi. In the spring of 1979 the defendant, using the same name, came to her house with two boxes of Hummels, some of which were damaged. After examining them, she paid the defendant between $800 and $1000 for the merchandise. On June 12, 1979, when the police visited her in the course of investigating the theft from the house in Woodbury, she still had in her possession about fifteen of the Hummels received from the defendant, the others having been sold. She delivered the remaining Hummels to the police and they were subsequently identified by the owner as part of the collection which had been stolen in Woodbury on April 19, 1979.

The defendant testified in his own behalf, denying his participation in the theft and any dealings with Eileen Snyder.

I

The defendant claims error in the exclusion of a question related to the interest of the state's principal witness against him, Edward Benner, a self-confessed accomplice in the crimes charged. A few days before the

trial began, Benner had pleaded guilty to four charges arising from the burglary and theft in Woodbury: burglary in the third degree, larceny in the first degree, conspiracy to commit burglary in the third degree and conspiracy to commit larceny in the first degree. He testified that, although he believed he could receive a maximum sentence of sixty years for those offenses, the state had not agreed to make any recommendation concerning the sentence to be imposed.

On cross-examination Benner was asked whether he hoped that his testimony at the defendant's trial would help him at the time he was sentenced for his involvement in the Woodbury crimes. He responded, "I pray a lot." Later in his cross-examination Benner was asked whether he hoped to receive a sentence for the Woodbury crimes which would be concurrent with sentences he was presently serving for some unrelated crimes. The court sustained the state's objection and the defendant excepted to the ruling.[1]

[1] The transcript of this portion of the evidence is as follows:

"Q. So, you are hoping that you get a concurrent sentence in this particular case?

"Mr. Ward: Objection, your Honor. Again, he is going into the conviction which he submitted through the records. He can't have it both ways. Either the record or the cross-examination. He made his election.

"The Court: Objection sustained.

"Mr. Avitabile: If your Honor pleases, the question was what he hopes out of this case.

"The Court: He can be hoping to get out tomorrow morning if the jail burned down or something else, too. You know, there are a million things that could happen.

"Mr. Avitabile: The jury is entitled to know that he could get consecutive or concurrent sentences, so forth and so on.

"The Court: I beg your pardon?

"Mr. Avitabile: The jury is entitled to know what the sentencing procedure is that you can get concurrent or consecutive sentences.

"The Court: The records speak for themselves as to anything.

"Mr. Avitabile: Not about the particular case we are talking about here. The case that he pled guilty to—

"The Court: Objection is sustained.

"Mr. Avitabile: May I have an exception.

"The Court: Exception may be noted."

"Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted." *State* v. *Wilson,* 188 Conn. 715, 720, 453 A.2d 765 (1982). The principal purpose of the right guaranteed to an accused "to be confronted with the witnesses against him" by the sixth amendment of our federal constitution is to provide the opportunity for cross-examination. *Douglas* v. *Alabama,* 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); 5 Wigmore, Evidence (Chadbourn Rev.) § 1395. "We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis* v. *Alaska,* 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Greene* v. *McElroy,* 360 U.S. 474, 496–97, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959).

Although a trial judge has authority to restrict the scope and extent of cross-examination within reasonable limits, this discretion may not be exercised until a defendant has been permitted as a matter of right sufficient cross-examination to satisfy the confrontation clause of the sixth amendment. *United States* v. *Vasilios,* 598 F.2d 387, 389 (5th Cir. 1979). That constitutional standard is satisfied only when a defendant has "been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis* v. *Alaska,* supra, 318. Although the trial court should have permitted the inquiry concerning Benner's hope for a concurrent sentence on the pending charges, the contrary ruling did not under all the circumstances have the effect of violating the defendant's right of confrontation. The jury had been apprised of the four crimes which Benner had admitted by his plea of guilty and were aware that his sentence upon them had been deferred until after he

had testified against the defendant. They knew that Benner believed he was exposed to a maximum sentence of sixty years for those offenses. The essential point, that Benner was hoping for leniency in the disposition of the charges against him, had been effectively made by the question whether he hoped that his testimony against the defendant would help him at the time he was sentenced and his response thereto, "I pray a lot." Although the state suggests no good reason for disallowing the related inquiry concerning Benner's hope for a concurrent sentence, this isolated ruling does not in the context of the whole case amount to a deprivation of the opportunity to reveal the facts from which the jury "could appropriately draw inferences relating to the reliability of the witness." *Davis* v. *Alaska,* supra, 318.

The defendant points to two circumstances which he contends gave the exclusion of his inquiry about a concurrent sentence significant prejudicial impact: (1) the testimony of Benner's sister that he had no motive to lie because he was already serving a sentence, which had been imposed for crimes unrelated to the Woodbury incident; and (2) a claim to the same effect allegedly made by the state's attorney during final arguments. In respect to the latter, it appears that the arguments were not recorded, no request to do so having been made. Since the state does not concede the defendant's version of what transpired and the closing arguments have not been reconstructed in some other way, we cannot review the defendant's claim as related to the arguments. *State* v. *Killenger,* 193 Conn. 48, 58, 475 A.2d 276 (1984); *State* v. *Vitale,* 190 Conn. 219, 226, 460 A.2d 961 (1983).

The testimony referred to was given during the defendant's cross-examination of Benner's sister, who had testified that she had seen the defendant in a car with her brother several times and that, after her

brother's arrest, the defendant gave her $200 to help pay for his lawyer. This portion of her extensive cross-examination was as follows:

"Q. And, aren't you lying here fingering this man in order to protect your brother?

"A. What good would that do? My brother is already in prison. If I lied on this witness stand and went to jail, there would be no one to care for my six kids. They come first.

"Q. If you lied on this witness stand that it would help your brother with his cases, that would make you happy, wouldn't it?

"A. Would it get him out of jail?"[2]

We see nothing in this testimony, elicited by the defendant, which would have accentuated the minimal prejudice he may have suffered from the exclusion of his inquiry of Benner about a concurrent sentence.

There was a very thorough cross-examination of Benner relating to his credibility. Evidence of his several prior convictions was introduced, including one for giving a false statement under oath to a police officer. It was brought out that Benner had refused to sign the statement he gave to the police implicating the defendant until a felony charge of burglary in the third degree of a house in Prospect was reduced to the misdemeanor of criminal trespass in the second degree. In addition the trial court gave an elaborate charge on the considerations involved in judging the credibility of an accomplice, a "self-confessed criminal," including the observation that "he may in his own mind be looking for or hoping for some favors in the disposition of his own case and . . . may have such an interest in the

[2] The court sustained the state's objection to the last question and struck the answer. The defendant excepted to this ruling but has not claimed it as error on appeal.

outcome of the case on trial that his testimony might be colored by that fact." We are persuaded that the ruling complained of did not deprive the defendant of a fair opportunity to bring to the attention of the jury any significant consideration bearing upon the credibility of Benner.

II

The next ruling claimed as error also is related to the credibility of the state's witness, Benner. A corrections officer, Fran Sultaire, who worked at the Litchfield jail where the defendant was employed in a similar capacity, was called by the defendant as a witness. In the course of his testimony he said that he became acquainted with Benner as an inmate of the prison during the period from January to June 1979. He testified that during this period he had formed an opinion of "Benner's character trait for . . . truth and veracity" and still had such an opinion. To a question eliciting that opinion the state objected that an inadequate foundation had been laid because Sultaire's observations of Benner were limited to "early '79," an insufficient basis upon which to evaluate Benner's truthfulness at the time of trial in September, 1980. The court sustained the objection and the defendant excepted to the ruling.

We have followed the rule which permits character or disposition to be proved "by the opinion evidence of those who have been shown to have had an opportunity to form, and who have formed, an opinion as to the character of the [subject] with respect to the trait or traits in issue." *State* v. *Blake*, 157 Conn. 99, 104–105, 249 A.2d 232 (1968); *Richmond* v. *Norwich*, 96 Conn. 582, 594, 115 A. 11 (1921). Whether a witness has had sufficient contact with a person to be qualified to testify as to a particular character trait is a matter peculiarly within the discretion of the trial court and "its ruling

will be disturbed only in a clear case of abuse or of some error in law." *State* v. *Rodriquez*, 180 Conn. 382, 389, 429 A.2d 919 (1980); *Siladi* v. *McNamara*, 164 Conn. 510, 513, 325 A.2d 277 (1973). Although the focus of the colloquy in the trial court and of the arguments on appeal has been the lapse of more than a year from Sultaire's last contact with Benner, the fact that their acquaintance was limited to a prison setting and to a period of less than six months was also significant. Benner was held in the Litchfield jail on two or three occasions from January to June 1979. The record does not disclose the duration of these confinements, except that he was there for ten days in June. It also fails to show the frequency of Sultaire's contacts with Benner as distinguished from other prisoners. The trial court did not abuse its discretion in disallowing the question at issue for lack of a sufficient foundation.

III

The defendant claims error in several rulings allowing the state to question Sultaire on cross-examination concerning what he would have done if Benner had contacted him under the same circumstances as those in which Benner had been involved with the defendant, as indicated by the evidence.

The theory of the defense was that Benner was "framing" the defendant for his own benefit. Before Sultaire testified, the defendant had taken the stand and admitted that on June 25, 1979, Benner had telephoned him and then brought to his apartment a stereo set which the defendant said he purchased for $800. He claimed to have asked whether the set was stolen and he denied that Benner had told him that it was stolen. He also denied that the purchase price was $300 as Benner had stated.

The state in cross-examining Sultaire asked whether he would have permitted Benner to come to his apartment to show him a stereo set. The court initially sustained the defendant's objection to this line of inquiry. On redirect examination the defendant again brought out that Sultaire had warned him about Benner and that the defendant had indicated his disbelief of that warning. On recross examination, when the state sought to ask the same questions which had earlier been excluded as to what Sultaire would have done if Benner wanted to sell a stereo set to him, the court reversed its previous ruling and, over the defendant's objection and exception, allowed the inquiry. Sultaire testified that he would not have bought a stereo from Benner or allowed him to come to his apartment at night or paid $800 for unwrapped stereo equipment with no evidence of ownership by Benner. The admission of this testimony and the denial of his motion to strike it are claimed as error by the defendant.

The basis for the defendant's objection to this testimony at trial was that the question asked the witness to "make a conclusion," that it was outside the scope of the direct testimony, and that it was irrelevant for the purpose of showing any felonious intent on the part of the defendant. On appeal the defendant no longer presses his claim that the scope of direct examination was exceeded, but continues to adhere to his objections based upon the inadmissibility of the opinion of a lay witness and the irrelevancy of the testimony.

The defendant had presented Sultaire as a corrections officer of ten years experience and had elicited his views on such matters as prison routine, his observations of Benner's extraordinary attempts to ingratiate himself with the defendant, and his characterization of Benner as a "shifty guy" who would try to "jam up" the defendant. On the subject of the relationships between guards and prisoners Sultaire had substantial

expertise, which the defendant himself called upon in his direct examination. The questions asked by the state's attorney as to what Sultaire would have done if a former inmate contacted him under the same circumstances as those which existed when Benner had sold the stereo set to the defendant were within the general field of the specialized knowledge Sultaire had gained from ten years employment as a corrections officer. The admission of this evidence, therefore, did not violate the general prohibition against statements of opinion by lay witnesses because Sultaire was sufficiently qualified to render his views on this subject more valuable to the trier than those of a witness lacking his credentials.

In regard to the relevancy of the inquiry, the fact that an experienced corrections officer would be highly suspicious of a former inmate attempting to sell him stereo equipment under the circumstances referred to tends to indicate that the defendant, a corrections officer of similar experience, also must have realized that the stereo he purchased from Benner was probably stolen, in contradiction of his testimony that he believed otherwise. The testimony was admissible, therefore, not only upon the credibility of the defendant's testimony that he had been duped by Benner in that transaction but also to show that his association with Benner, at a time coinciding closely with the burglary in Woodbury, was not wholly innocent, as he claimed.

IV

The defendant claims error in several rulings excluding his testimony of what Benner had told him in conversations pertaining to their relationship as prisoner and guard. Although the court permitted the defendant to state what he had said to Benner, objections to Benner's statements were sustained on the ground of hearsay. The defendant concedes that no exception was

taken to these rulings, as required by Practice Book § 288, but now claims a violation of his state constitutional "right to be heard by himself . . . ." Article first, § 8. He also maintains that Benner's out-of-court statements were admissible as an exception to the hearsay rule for the purpose of establishing their effect upon the defendant's mental state, a ground for admissibility not advanced at trial.

The defendant seeks review of these rulings under the exception we have created to the general prohibition against review of claims not raised at trial in instances where it appears that a defendant "has clearly been deprived of a fundamental constitutional right and a fair trial." *State* v. *Evans,* 165 Conn. 61, 70, 327 A.2d 576 (1973). "Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." *State* v. *Gooch,* 186 Conn. 17, 18, 438 A.2d 867 (1982). The constitutional right of a defendant to testify does not permit him to give testimony in disregard of the rules of evidence. Nor does it entitle him to appellate review of a claimed erroneous ruling without compliance with the procedures established for preserving such a claim. We decline, therefore, to review this claim of error because of the failure of the defendant to raise his present claim in the trial court and to take exception to the ruling as required by Practice Book § 288. See Practice Book § 3063.

V

The defendant claims that the court erred in excluding the testimony of an experienced criminal attorney as an expert witness upon the subject of the factors which had induced the state to enter a plea bargain with Benner in respect to charges arising out of the burglary of a home in Prospect. It had been brought out that, before Benner would sign the statement implicating

the defendant in the Woodbury burglary, the state had agreed to reduce the original charge of burglary in the third degree arising out of Benner's break into the Prospect home to second degree criminal trespass with a sentence of six months suspended after thirty days and probation for one year. The expert witness had no actual knowledge of this plea bargain but would have testified, in response to a hypothetical question giving the circumstances of the Prospect crime, that the state was seeking Benner's cooperation in order to convict the defendant in the present case and that the prime reason for the reduction in the charge was to obtain Benner's statement against the defendant.

We agree with the state that the trial court exercised its discretion wisely in excluding this testimony. The inferences which the defendant attempted to elicit from the attorney are so obvious that they could as readily be drawn by the jury and as well articulated by the defendant's counsel in his summation. Although the witness may have been an experienced criminal lawyer, the proffered testimony was merely a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence. It is only when an expert witness has a special skill or knowledge, beyond the ken of the average juror, on the particular subject at issue that his testimony can be helpful and, accordingly, should be admitted. *Siladi* v. *McNamara*, 164 Conn. 510, 513, 325 A.2d 277 (1973). The testimony of the defendant's expert witness which the court excluded did not qualify under this standard.

VI

The final claim of error is that the court refused to grant one of the defendant's requests to charge which related to the credibility of Eileen Snyder, who had identified the defendant as the person who delivered

the Hummels stolen from the Woodbury residence to her. The requested instruction sought special consideration of her interest and motivation, her memory of the two occasions when, according to her testimony, she had met the defendant, her statements to other witnesses, her identification of the defendant, and other aspects of her testimony.

The court gave the jury a general charge upon the credibility of witnesses, mentioning particularly their interest in the outcome of the trial, their ability to remember what they had observed, and the significance of any inaccuracies in their testimony. The court commented in particular upon the credibility of Benner as an accomplice, of the police officers and of the defendant. No specific reference was made, however, to the testimony of Eileen Snyder.

The defendant relies upon our statement in *State* v. *Ferrara,* 176 Conn. 508, 512, 408 A.2d 265 (1979), that " '[i]t is well settled law that "[t]he fact that the witness is a defendant in a criminal prosecution, or is a participant in the offense or in a related offense, creates an interest which affects his credibility." ' " He also cites *State* v. *Cooper,* 182 Conn. 207, 212 n.5, 438 A.2d 413 (1980), which declares that "the defendant is entitled to such an instruction [upon the credibility of a witness in the light of any motive for testifying falsely and inculpating the accused] only where it is requested with regard to a complaining witness who could himself be subject to prosecution depending upon the veracity of his version of the particular criminal transaction involved."

The statement in *Cooper* is inapplicable because Snyder plainly was not a complaining witness. The court expressly limited the applicability of *Cooper:* "We do not suggest that, under our holding, a criminal defendant would be entitled to an instruction singling

out any witness who testifies for the state and highlighting his possible motive for falsifying his testimony." Id.

The principle in *Ferrara* which the defendant relies upon was not intended to go beyond the holding of the case that, "where warranted by the evidence, it is the court's *duty* to caution the jury as to the testimony of an accomplice in its charge." *State* v. *Ferrara,* supra, 511. It is, of course, fundamentally inconsistent with the defendant's claim that he never knew Snyder before trial for him to seek a charge upon credibility predicated upon her status as his accomplice. The only evidence of her criminal involvement was contained in the written statement of Benner that the defendant had told him she was a "fence" for Hummels. The defendant, not surprisingly, repudiated the statement attributed to him by declaring that he never knew Snyder before trial. Even if the statement were true, it would not have established Snyder's complicity in the crimes charged against the defendant. There is no evidence that she was in any respect an accomplice in his crimes of conspiracy to commit larceny and to commit burglary.

A portion of the defendant's request, which the court did not include in the charge, related to Eileen Snyder's identification of the defendant. Although we have indicated that a court should grant a request for a charge regarding the dangers of misidentification in an appropriate case, we have not found reversible error in the failure to do so where "the conviction of the defendant did not turn upon the testimony of eyewitnesses who were uncertain, unclear or inconsistent." *State* v. *Harden,* 175 Conn. 315, 322, 398 A.2d 1169 (1978). See *State* v. *Maturo,* 188 Conn. 591, 600, 452 A.2d 642 (1982); *State* v. *Tinsley,* 181 Conn. 388, 393–94, 435 A.2d 1002 (1980), cert. denied, 449 U.S. 1086, 101 S. Ct. 845, 66 L. Ed. 2d 811 (1981). This case does not

present the typical problem of identification arising from a single brief encounter affording minimal opportunity for observation or involving highly suggestive circumstances. The defendant made no motion to suppress the testimony of Eileen Snyder upon those grounds nor would such a motion have had any likelihood of success. Snyder testified that the defendant, using the name Jack Stolfi, contacted her in connection with the sale of some Hummels on two occasions, about one or two years apart. She unhesitatingly selected the defendant's photo from a group of fourteen photographs which were never challenged as unduly suggestive. She also identified him in the courtroom. Furthermore, it was Benner's statement to the police concerning the defendant's remark to him about Eileen Snyder as a fence which led the police to the discovery of the stolen Hummels in her possession. As there is no indication of any contact between Snyder and Benner, the identity of the defendant as the purveyor of the stolen Hummels was confirmed by two independent sources. Under these circumstances, therefore, it was not essential for the trial court to give the requested instruction.

There is no error.

In this opinion the other judges concurred.

APPENDIX (2)

Order of Connecticut State Supreme Court

Denying Motion for Rehearing

Dated September 26, 1984

NO. 10488

STATE OF CONNECTICUT : SUPREME COURT

VS : STATE OF CONNECTICUT

NOEL GEORGE : SEPTEMBER 26, 1984

O R D E R

THE MOTION OF THE DEFENDANT, FILED SEPTEMBER 4, 1984, TO REARGUE,

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

By /s/ M. T. Angers
Assistant Clerk-
Appellate

Notice Sent:
Louis S. Avitabile
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